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No. 93-1170

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED STATES OF AMERICA, *et al.*,
Petitioners,
v.

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICUS CURIAE COMMON CAUSE IN SUPPORT OF PETITIONERS

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June 13, 1994

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF AMICUS CURIAE

Common Cause is a non-profit, non-partisan membership corporation organized under the laws of the District of Columbia.[1] Its principal objective is to further the interests of its 270,000 members in honest and responsible government. Common Cause seeks to promote these interests through reform of government and the political process.

Common Cause has a longstanding interest in laws promoting ethics in government. Common Cause actively supported the enactment of the Ethics Reform Act of

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[1] All parties to this case have consented to the filing of this brief. Copies of the written consents of the parties are on file with the Clerk of the Court.

1989. Representatives of Common Cause testified before the commissions appointed to recommend reforms of the ethics laws and before the relevant committees of Congress during their consideration of the 1989 legislation. Common Cause has appeared as an amicus curiae to support the constitutionality of the Ethics Reform Act of 1989 at virtually every stage of this litigation.

Common Cause believes that effective regulation over government employees' acceptance of honoraria is critical to maintaining (or more accurately to resuscitating) the public's confidence in and trust of their government, and to the integrity of our governmental processes.

BACKGROUND

Title VI of the Ethics Reform Act as amended ("the Act") prohibits the receipt of honoraria for any appearance, speech or article by any Member, officer, or employee of the United States government. This ban on honoraria does not prohibit any federal official from making a speech or appearance, or from publishing an article.[2] It provides only that a federal employee may not receive any payment for such activities other than reimbursement for travel expenses. 5 U.S.C. app. § 505(3) (Supp. IV 1992).

A group of executive branch employees, all grade GS-15 or below, filed suit to enjoin enforcement of the honoraria ban, as did two unions representing such employees. The district court denied a preliminary injunction in an unpublished opinion, and the court of appeals affirmed. 927 F.2d 1253 (D.C. Cir. 1991). The district court subsequently held that the honoraria ban was unconstitutional, not only as to lower-level federal employees but as to all executive branch employees of all grades. 788 F. Supp. 4 (D.D.C. 1992). The court of appeals affirmed by a 2-1 vote. 990 F.2d 1271 (D.C. Cir.), *opinions on denial of rehearing*, 3 F.3d 1555 (1993).

[2] Pub. L. No. 101-194, § 601(a), 103 Stat. 1760 (1989), codified at 5 U.S.C. app. § 501(b) (Supp.IV 1992). The honoraria provisions of the 1989 Act did not originally cover the Senate and its employees. Subsequent legislation extended the honoraria ban to all government employees, including Senators and their staff. Pub. L. No. 102-90, 105 Stat. 447, 450 (1991).

SUMMARY OF ARGUMENT

The ban on the receipt of honoraria by all federal employees, even lower-level executive branch employees, was part of a careful and deliberate choice by Congress to guard against conflicts of interest and the appearance of impropriety. Most federal laws governing ethics have applied generally and uniformly to all employees of all three branches of government. The Act's history demonstrates that the executive and legislative branch commissions that proposed the bill understood and intended that it would ban honoraria absolutely to all employees in all three branches. Congress explicitly adopted the judgments of these commissions, as did the President. The policy judgment that the predecessor statutes had failed and an honoraria ban was necessary has been amply justified by evidence that regulations short of an absolute ban were insufficient to prevent real and apparent abuses of government office and were enforced unevenly and unfairly. Public distrust of government is a very real and serious threat to the legitimacy of our institutions, and the honoraria ban was a reasoned response to that threat.

This Court's holdings on the authority of the government in its role as an employer justify a prophylactic ban on receipt of honoraria by its employees. The court below failed to apply the balancing test this Court announced in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), for determining the limits the government may impose on its employees' speech. Under this test, the government's interests support the honoraria ban.

Even if the appropriate test were whether the statute is unconstitutionally overbroad, the honoraria ban would

still be constitutional. As the court below correctly conceded, there are many employees at all levels of government as to whom a total ban on honoraria is appropriate. The drastic remedy of holding a statute facially invalid as to all executive branch employees is inappropriate where, as here, there are numerous instances in which the statute can be constitutionally applied.

Determining which federal employees should be prohibited from receiving honoraria is a quintessential example of a policy judgment reserved by the Constitution to the political branches of government. The Constitution cannot compel different treatment of the different branches of government, or different treatment of different levels of employees within a branch.

The plaintiffs here do not have standing to challenge the honoraria ban as applied to senior-level executive branch employees, and an absolute ban is necessary for such officials. Even if, contrary to the arguments above, the honoraria ban is invalid as to some of the plaintiffs, the appropriate remedy would be to enjoin its enforcement only against employees who do not exercise discretionary authority.

ARGUMENT

I. THE DECISION TO APPLY THE HONORARIA BAN TO EXECUTIVE BRANCH EMPLOYEES WAS A DELIBERATE POLICY CHOICE BY THE POLITICAL BRANCHES.

The honoraria provision was not, as has been suggested by the various plaintffis below and echoed in the opinion of the court of appeals, a chance and purposeless addition to the laws. Rather, it was part of a careful step-by-step effort by the political branches to protect against corruption and to ensure the appearance as well as the reality of impartiality in the federal government.

A. The Ban on Honoraria in the 1989 Act Was Neither Accidental nor Inadvertent.

Federal law has long recognized that employees at all levels of government can harm the public interest if they are subject to improper financial influence. Since the 19th century, conflict-of-interest statutes have prohibited all government employees from acting for the government in business transactions in which they have a financial interest. As this Court recognized,

> The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. Consonant with this salutary moral purpose, Congress has drafted a statute which speaks in very comprehensive terms. Section 434 is not limited in its application to those in the highest echelons of government service[.] [3]

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[3] *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961) (construing 18 U.S.C. § 434, a predecessor of 18 U.S.C. § 208 (1988), which applied to any "officer or agent of the United States").

Similarly, all executive branch employees have long been subject to the prohibitions against private compensation for government service and against bribery, graft, and representation of private parties in matters affecting the government.[4]

As part of these general prohibitions regulating the conduct of executive branch employees, federal regulations have long set forth general restrictions on the receipt of honoraria. Under these regulations, executive branch employees could not receive honoraria for speeches or articles that focus specifically on the employing agency's policies, create a conflict of interest, or interfere with the employee's official duties. These prohibitions, extending back decades, applied to all executive branch employees, rgardless of grade or pay.[5]

Thus, when in the wake of the Watergate era scandals Congress began the task of erecting prohibitions against the receipt of honoraria, it began its task against the backdrop of public corruption laws that were applied broadly. When Congress enacted in 1974 the first statutory limitations on the receipt of honoraria for an article, speech or appearance, it not surprisingly chose to apply the restrictions to every "elected or appointed officer or employee of any branch of the Federal Government." Under this law, the amount of any honorarium was limited to $1,000 (plus reimbursement for actual travel expenses), with an aggregate limit of $15,000 in any calandar year.[6] However, it departed from the prior regulations on one crucial point. Unlike the regulations, which were limited in scope by a subject matter test, the honoraria statutes applied to all speech, articles or appear-

[4] *See Bribery, Graft and Conflicts of Interest: Report of the Judiciary Committee*, S. Rep. No. 2213, 87th Cong., 2d Sess. (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3856-60 (discussing 18 U.S.C. §§ 201, 203, 205, 209 and their predecessor statutes).

[5] *See* 33 Fed. Reg. 12,487 (1968); 5 C.F.R. § 735 (1992).

[6] *See* Pub. L. No. 93-443, § 101(f)(1), 88 Stat. 1268 (1974).

ances without reference to the relationship between the subject matter and the official's duties. Two years later, the honoraria limits were raised to $2,000 per speech and $25,000 per year, and civil rather than criminal penalties were proscribed, but the restrictions continued to apply to government employees at all levels in all three branches and to all speeches, articles or appearances regardless of the subject matter or the identity or interests of the audience.[7]

The problems caused by the receipt of honoraria for articles, speeches and appearances were described in reports of special ethics panels in the House and Senate in 1977, which recommended the adoption of even tighter restrictions for members of Congress. Both panels recognized that polls and public surveys showed rising public cynicism over the practice of honoraria, and noted the inherent potential for conflicts of interest. The House adopted, as an internal rule applicable to House Members, a $750 limit on honoraria for any single speech, an annual limit on outside earned income, and regulations concerning travel expenses.[8]

The patchwork of statutes, regulations, and legislative rules in effect before 1989 proved insufficient to curtail

[7] Pub. L. No. 94-283, 90 Stat. 475, 494 (1976). The aggregate limit was later removed. *See* Pub. L. No. 97-51, 95 Stat. 958, 966 (1981). The monetary ceiling on honoraria for a speech or article is no longer in effect. The $2,000 limit was repealed by legislation imposing the complete ban on honoraria at issue in this case. *See* Pub. L. No. 101-194, § 601(a), 103 Stat. 1760 (1989) (conforming amendments) (executive and judicial branches and House of Representatives); Pub. L. No. 102-90, 105 Stat. 447, 450 (1991) (Senate). Thus, in light of the judgment of the courts below, currently there are no statutory limits on the honoraria that an executive branch employee can accept.

[8] *Financial Ethics: Communication from the Chairman, Comm. on Admin. Review*, H.R. Doc. No. 73, 95th Cong., 1st Sess. 9-12 (1977); *Senate Code of Official Conduct: Report of the Special Comm. on Official Conduct*, S. Rep. No. 49, 95th Cong., 1st Sess. 8-9, 37-40 (1977). The House rule was later revised.

the abuses created by outside income and to promote public confidence in the integrity of government. In 1989, President Bush recognized the continuing problem in the executive branch and provided a partial remedy, an executive order prohibiting all presidential appointees in the executive branch from receiving any outside earned income (including any honoraria).[9] In the legislative branch, the limits on honoraria also proved inadequate. Honoraria received by members of the House and Senate fueled the public perception that special interests were engaging in influence-peddling. Sizeable honoraria for congressional staff members also created the appearance of impropriety in the operations of the government. For instance, the press gave widespread coverage to honoraria received by staffers—including $28,000 in honoraria pocketed during a two-day barnstorming trip to Oklahoma and Texas by the top staff aides to House speaker Jim Wright and minority leader Robert Michel.[10]

Newspaper articles and editorials across the country reflected the public view of honoraria as "legalized bribery," "legislative prostitution," "shameless pandering to special-interest payoffs," "bag money," "lobbyist payola," "appalling," a "disgrace" and a "low-life prac-

[9] *See* Executive Order No. 12,674 (1989), 3 C.F.R. 215 (1990) (codified as 5 U.S.C. § 7301 Part I (Supp. IV 1992)).

[10] *See* Richard Stengel, *Morality Among the Supply-Siders*, Time, May 25, 1987, at 18 (listing ethical lapses by executive branch officials, including improper payments from private parties); Charles R. Babcock, *For Two in the House, A Fast $28000 in fees*, Wash. Post, Oct. 6, 1989, at A20; *see also* John E. Yang, *Honoraria, Bounty of Special Interest Groups, Trickle Down to Some Congressional Staffers*, Wall St. J., May 26, 1989, at A12; Charles R. Babcock, *Interest-Group Honoraria Plentiful for Top Hill Aides*, Wash. Post, Oct. 6, 1989, at A1; Carol Matlack, *Gravy Train*, Nat'l J., Jan. 28,1989, at 257; Dan Vukelich, *Honorarium Ban Would Hit Hill Staff, Officers in Wallet*, Wash. Times, Feb. 7, 1989, at A6; Kimberly Mattingly, *Staff Plays Honoraria Game Too*, Roll Call, Jan. 22, 1989, at 1.

tice."[11] Against this background, the political branches began again the task of overhauling the honoraria laws.

To assist in this effort, Congress and the President appointed a series of blue-ribbon panels to study ethics law reform. After taking extensive testimony, each of those panels specifically recommended a complete ban on the receipt of all honoraria by all government personnel. The Quadrennial Commission concluded that the "potential for impropriety in the present rules governing honoraria was so high that the practice of receiving honoraria should be eliminated." It "strongly recommend[ed] that the practice of accepting honoraria in all three branches be terminated by statute[.]"[12]

Similarly, the President's Commission on Federal Ethics Law Reform urged legislation to "ban the receipt of honoraria by all officials and employees in all three branches of government."[13] The President's Commission concluded that a restriction on honoraria limited by a relational test to the official's duties would be insufficient because of the risk of circumvention.[14]

Finally the fourteen members of the House Bipartisan Task Force on Ethics agreed that "honoraria [should] be abolished for all officers and employees of the govern-

[11] *Quoted in Report of 1989 Comm'n on Executive, Legislative, and Judicial Salaries: Hearings Before the Senate Comm. on Governmental Affairs*, 101st Cong., 1st Sess. 30, 32 (1989) (statement of Fred Wertheimer, President of Common Cause).

[12] Comm'n on Executive, Legislative and Judicial Salaries, *Fairness For Our Public Servants* 24 (Dec. 1988).

[13] President's Comm'n on Federal Ethics Law Reform, *To Serve With Honor* 35-36 (Mar. 1989) (hereinafter *To Serve With Honor*).

[14] *To Serve With Honor*, Recommendation 6, 33-37 ("[t]o curtail the risk that individuals will find a way to circumvent these restrictions, the bar on honoraria necessarily needs to extend both to activities related to an individual's official duties and to other activities").

ment[.]"[15] In language echoing that of the President's Commission, the Bipartisan Task Force warned against "circumvent[ion]" of the rules and urged that the honoraria ban extend to topics both related and unrelated to the official's duties.

The panels' recommendations reflected a number of important and interrelated judgments. First, the panels affirmed that the receipt of honoraria for articles, speeches and appearances undermined public confidence in fair government and created an appearance of impropriety, if not actual impropriety itself.

Second, the various reports, especially that of the President's Commission, explained that there existed an extreme and unacceptable lack of uniformity across the branches of government with respect to the honoraria laws and that the laws and rules applicable to the legislative branch were far too lax.[16] The panels determined that the potential for abuse—although differing in degree—existed at all levels of government employment, from the highest to the lowest. The commissions concluded that if the prohibition against the receipt of honoraria was to be successfully applied to Congress, as they all believed it had to be, then an equally rigorous ban would also have to be applied consistently to all three branches. This conclusion was based on considerations of fairness and of political practicality.

Third, the panels recognized the historical antecedents of the honoraria rules, and limited the reach of their proposed rules to articles, speeches, and appearances in the belief that the restrictions should be tailored to the problem at hand. Finally, the commissions concluded

[15] House Comm. on Rules, 101st Cong., 1st Sess., *Report of the House Bipartisan Task Force on Ethics on H.R. 3660* 14 (Comm. Print 1989) (hereinafter *Bipartisan Task Force Report*). This report specifically noted that its proposed restrictions would affect "rank-and-file employees of the executive branch[.]" *Id.* at 13.

[16] *To Serve With Honor* at 35-36.

that a broad prophylactic ban applicable to topics both related and unrelated to an employee's employment was necessary to prevent the risk of abuses and the appearance of corruption and to curtail the risk that honoraria payers and government employees would circumvent the rules and that agencies would apply subjective rules in an uneven fashion.[17]

These recommendations served as the basis for Congress' and the President's decision to adopt the honoraria ban.[18] Upon signing the 1989 Ethics Reform Act, President Bush praised the statute as containing "important reforms that strengthen Federal ethical standards" and described the honoraria ban for federal employees as one of the "[k]ey reforms in the Act."[19] Far from being a chance addition to the Act, the uniform and absolute ban on honoraria was the crucial reform that allowed the remainder of the Act to pass.[20]

[17] *See, e.g., To Serve With Honor* at 34 (describing "eclectic" set of rules among executive agencies).

[18] *See* Statement on Signing the Ethics Reform Act of 1989, 25 Weekly Comp. Pres. Doc. 1855 (Nov. 30, 1989) (the Act "is based on . . . the recommendations of the President's Commission on Federal Ethics Law Reform, and the report of the House Bipartisan Ethics Task Force."); 135 Cong. Rec. H8747-48 (daily ed. Nov. 16, 1989) (remarks of Rep. Lynn Martin, co-chair of House Bipartisan Task Force) ("a good part of [the bill] is based on the recommendations of the President's ethics commission").

[19] Statement on Signing the Ethics Reform Act of 1989, *supra*, note 18.

[20] The political branches have continued their effort to solve the problem of honoraria. This year both houses of Congress have passed bills limiting the gifts, trips, and meals that Members of Congress can receive from lobbyists. *See Congressional Gifts Reform Act: Report of the Committee on Governmental Affairs*, S. Rep. No. 255, 103d Cong., 2d Sess. 1-3 (1994) (discussing various bills). Where the political branches believe the problem of honoraria affects only the legislature, they are fully capable of passing legislation applying only to Congress.

B. Ample Facts Support the Policy Choice by the Political Branches to Ban Honoraria.

The court of appeals founded its conclusion in significant part on a factual assumption that is demonstrably wrong: that there were no improprieties before 1989 that would have been prevented by the honoraria ban, and there were no "serious enforcement or line-drawing costs" associated with the prior regime.[21] In fact, the reasonableness of the policy judgment to ban honoraria has been borne out since passage of the Ethics Act. A report of the General Accounting Office ("GAO Report") demonstrates that the old rules were not working.[22] The report presents the results of a GAO study of federal employees' activities outside the scope of their employment, the conflicts of interest that may result from those activities, and the effectiveness of regulations designed to safeguard against improprieties.

Based on its investigation of eleven agencies, the GAO Report addresses the adequacy of agency controls over federal employees' outside activities, including controls on speaking and writing, prior to the effective date of the honoraria ban. In direct contradiction to plaintiffs' repeated assertions that existing conflict of interest regulations were adequate, the GAO Report concludes that "[s]ome agencies did not monitor employees' activities outside of the government to the extent needed to ensure that violations of related laws and regulations were

[21] 990 F.2d at 1276. As the district court correctly found, "[a]buses of the 'honoraria' custom and practice were well-documented, as was the consequent erosion of public confidence in the integrity of government, and had been common public knowledge for many years." 788 F. Supp. at 8.

[22] U.S. General Accounting Office, *Employee Conduct Standards: Some Outside Activities Present Conflict-of-Interest Issues* (released to Congress in Feb. 1992; released to public on Mar. 30, 1992) (hereinafter *GAO Report*) (reprinted as Appendix B to Common Cause's Brief in Support of Certiorari).

avoided."[23] Indeed, the report notes that "[b]ecause of overly permissive approval policies, five agencies approved some outside activities, such as speaking and consulting, that appeared to violate the standard of conduct prohibiting the use of public office for private gain. These activities preceded the . . . ban by Congress on the acceptance of honoraria (compensation) by most federal employees for outside speeches, articles, and appearances."[24]

Moreover, the GAO Report points to the uneven enforcement of the pre-1989 conflict-of-interest regulations. "Standard-of-conduct regulations and procedures for monitoring employees' outside activities varied widely among the 11 agencies. . . . [The GAO] found little consistency in the restrictions on employees' outside activities or agency approval requirements."[25] The uneven enforcement of the pre-ban regulations identified in the GAO Report created a system of perceived and actual unfairness that seriously undermined the pre-existing conflict-of-interest regulations. Against this backdrop, the judgment of the political branches that a broad prophylactic ban was needed to curb the actual and potential abuse of honoraria was clearly reasonable.

[23] *GAO Report* at 1.

[24] *GAO Report* at 2.

[25] *GAO Report* at 6. In addition, the GAO Report found:

> Most agencies did not periodically update their approvals of employees' outside activities that were to continue over several years even though employees' duties could change over this time to create conflicts of interest. *Id.* at 7.
>
> Some agencies did not require that employees provide adequate information necessary for determining whether conflict-of-interest and standard-of-conduct requirements were met. *Id.* at 7.
>
> Some agencies did not require employees to report the amount of compensation they expected to receive from outside activities. Thus, the agencies could not determine whether the employees complied with restrictions on outside compensation. *Id.* at 7.

The activities of the individual plaintiffs themselves (many of whom exercise important discretionary functions, despite their self-description as low-level employees) raise substantial questions about the effectiveness of subjective regulations. For instance, the agricultural editor for the Voice of America complains that the honoraria ban unfairly prohibited him from speaking for payment before a gathering of agricultural groups at a conference in Rome. These groups have a substantial interest in the contents of his VOA reports, but this apparently did not raise questions of conflict of interest either for him or for his agency. Similarly, the business editor at the VOA, also a plaintiff, has written articles on a free-lance basis for organizations such as American Express and the U.S. Chamber of Commerce, even though they have a decided interest in how the VOA reports business news. 990 F.2d at 1275-76. And, as the court below noted, one "can understand some anxiety about receipt of payment" by a GS-7 tax examining assistant, given "the universality of citizens' subjection to the Internal Revenue Services." *Id.* at 1276. The judgment of the political branches that subjective regulations and self-policing by those with interest in nonenforcement were inadequate is borne out on the facts of this case.

Further, substantial evidence supports the judgment that the decline in public confidence in the government warrants a broad ban on government employees' receipt of honoraria. By the late 1980's, public trust in government had dropped to levels even lower than in the aftermath of Watergate, and a large majority of the citizenry believed that all branches of government were more responsive to wealthy special interests than to the good of the country as a whole.[26] Indeed, an extensive academic

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[26] *See, e.g.*, David Broder et al., *A Grass-Roots Report: Voters Voice Increasing Disillusionment*, Wash. Post, Apr. 22, 1987, at A1; Michael Oreskes, *As Election Day Nears, Poll Finds Nation's Voters in a Gloomy Mood*, N.Y. Times, Nov. 4, 1990, at A1. Public confidence in government has continued to erode since that time. *See* Robert Shogan, *Public Discontent for Lawmakers Hits New*

literature supports the argument that executive branch officials may be "captured" by the interests they are supposed to regulate.[27] These concerns have only become more acute since 1989, and a decision by this Court to override the political branches' limitation on the receipt of honoraria would surely exacerbate public distrust of government.

II. THE COURT BELOW FAILED TO APPLY THE *PICKERING* BALANCING TEST GOVERNING PUBLIC EMPLOYEES' SPEECH.

The court below erred when it failed to apply the test this Court has established for evaluating regulations of speech by government employees. This Court has held that the government in its role as employer has greater power to regulate the terms and conditions of government employment for employment-related reasons than it has in other contexts. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *see Connick v. Myers*, 461 U.S. 138, 140 (1983); *Snepp v.*

See Robert Shogan, *Public Discontent for Lawmakers Hits New Highs*, L.A. Times, Mar. 10, 1994, at A5; Dan Balz and Richard Morin, *Perot Factor Still Percolates*, Wash. Post, May 23, 1994, at A1. The 1989 Bipartisan Task Force Report stated the purpose of the Ethics Reform Act in a single sentence: "to restore public confidence in the integrity of government officials by promoting the highest professional and ethical standards in public service." *Bipartisan Task Force Report* at 1.

[27] *See, e.g.*, Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985); James V. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 Va. L. Rev. 257 (1979); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975); George J. Stigler, *The Theory of Economic Regulation*, 2 Bell. J. Econ. & Mgt. Sci. 3 (1971); Paul J. Quirk, *Industry Influence in Federal Regulatory Agencies* (1981).

United States, 444 U.S. 507, 509 n.3 (1980). These cases require the Court "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon issues of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. No subsequent decision of this Court has supplanted the *Pickering* balancing test. *See Waters v. Churchill*, No. 92-1450, 1994 U.S. LEXIS 4104, at *21-*22 (May 31, 1994) (citing *Pickering* as the relevant test).[28]

The broad authority of Congress to regulate the speech of federal employees is illustrated in the cases upholding the constitutionality of the Hatch Act's limits on government employees' right to engage in political advocacy at the core of the First Amendment. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers ("CSC")*, 413 U.S. 548 (1973); *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947). In *CSC*, 413 U.S. at 564, the Court recognized that Congress faces a range of policy choices regarding permissible activities by government employees, and that it is within Congress' discretion to choose among competing alternatives. By comparison to the Hatch Act's absolute ban on core political speech, the Ethics Reform Act's mere limit on receipt of compensation is at most a minor burden on the speech of government employees.[29]

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[28] *See also Waters*, 1994 U.S. LEXIS 4104 at *21 ("the government as employer indeed has far broader powers than does the government as sovereign"); *id.* at *29 ("the extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible").

[29] The honoraria ban only regulates the financial consequences of speeches, articles or appearances, rather than the speech itself. 990 F.2d at 1273. While restrictions on financial incentives may implicate First Amendment concerns, *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), the character and effect of the restriction is relevant to the *Pickering* balancing test. Here, government employees are permitted to speak and write, and they are also entitled to reasonable travel expenses. Moreover, the restrictions in *Simon & Schuster*, 112 S. Ct. at 508, were content-based, while the honoraria ban is content-neutral, 788 F. Supp. at 7.

Although the Court of Appeals noted *Pickering*, it did not even attempt to apply the balancing test set forth there. Rather, it engaged in an overbreadth analysis, without giving adequate consideration either to the lower burden necessary to justify a restraint on government employees' speech,[30] or the limited nature of the restraint at issue here (a ban on compensation, not a ban on speech). It thus erred in departing from the *Pickering* test.

The court below did recognize that "the government has a strong interest in protecting the integrity and efficiency of public service and in avoiding even the appearance of impropriety created by abuse of the practice of receiving honoraria." Indeed, the court found it could "safely assume . . . that the interest in avoiding the appearance of impropriety is strong enough to outweigh government employees' interest in engaging in speech for compensation where the compensation creates such an appearance." [31] The court below conceded that "for some of [its] applications—perhaps many of them," the honoraria ban is constitutional under the *Pickering* balancing test.[32] Under this Court's precedents, that is sufficient to sustain the facial constitutionality of the statute, and should have ended the analysis. This departure from the teachings of *Pickering* imperils the federal government's ability to act reasonably as an employer

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[30] *See* 3 F.2d at 1565 (Silberman, J., dissenting from denial of rehearing) (government interest need not be compelling, and need not even substantially outweigh burden on speech, in order to satisfy the *Pickering* balancing test) (*citing Connick*, 461 U.S. at 150).

[31] 990 F.2d at 1274 (emphasis in original omitted).

[32] *Id.*

—as distinct from its role as the state—and to regulate its workers so that they can effectively and efficiently carry out their duties.[33]

III. THE HONORARIA BAN IS NOT SUBSTANTIALLY OVERBROAD.

Even if overbreadth were the proper form of analysis rather than the *Pickering* balancing test, plaintiffs have not met the difficult standard that this Court's decisions establish.[34] Statutes may be found facially invalid only in two limited circumstances: the plaintiff must demonstrate that the challenged law either "could never be applied in a valid manner" or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it "may inhibit the constitutionally protected

[33] *See Waters v. Churchill*, 1994 U.S. LEXIS 4104 at *28-*29 ("The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as an employer. . . . [W]here the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate").

[34] "[F]acial challenges to legislation are generally disfavored," *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990). In general, this Court has deemed as-applied challenges to be sufficient to protect constitutional rights. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). Facial challenges must be approached "with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). *See also Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 977 (1984) (Rehnquist, J., dissenting) ("When a litigant challenges the constitutionality of a statute, he challenges the statue's application to him. . . . If he prevails, the Court invalidates the statute, not *in toto*, but only as applied to those activities. The law is refined by preventing improper applications on a case-by-case basis. In the meantime, the interests underlying the law can still be served by its enforcement within constitutional bounds").

speech of third parties."[35] Different substantive standards apply to each of these types of facial challenges.

The first standard is not implicated here, because the honoraria ban is clearly constitutional in some circumstances, as the court below conceded. 990 F.2d at 1274.[36] As for the second kind of facial challenge, it "will not succeed unless the statute is 'substantially' overbroad, which requires the court to find 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections *of parties not before the Court*.'"[37] Because plaintiffs are seeking to vindicate their own rights, not the rights of third parties, overbreadth is simply the wrong legal analysis, and facial invalidation the wrong remedy, for this case.

Even if overbreadth were the applicable doctrine, the Ethics Reform Act is not substantially overbroad.[38] The court below struck down the honoraria ban because the statute does not require a nexus between the employee's

[35] *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988) (quoting *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984)).

[36] "[T]he first kind of facial challenge will not succeed unless the court finds that '*every* application of the statute create[s] an impermissible risk of suppression of ideas.'" *New York State Club*, 387 U.S. at 11 (quoting *Vincent*, 466 U.S. at 789 n.15).

[37] *New York State Club*, 487 U.S. at 11 (*quoting Vincent*, 466 U.S. at 801) (emphasis supplied). The courts are "reluctant[] to strike down a statute on its face where there [are] a substantial number of situations to which it might be validly applied." *Parker v. Levy*, 417 U.S. 733, 760 (1974); *cf. Joseph H. Munson Co.*, 467 U.S. at 964-65 (for overbreadth challenge to succeed, plaintiff must show there is no core of easily identifiable conduct the statute may permissibly regulate).

[38] The only case in which this Court has applied an overbreadth analysis to speech by government employees is *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). In *Broadrick*, the Court upheld a restriction far more onerous than that at issue here: a total ban on speech (compensated or uncompensated) in political campaigns.

job and the subject matter of the speech or the character of the payor. But this conclusion is a non-sequitur for several reasons. First, as discussed above, it does not address the government's interest in regulating its employees,[39] and relies entirely on inapplicable cases concerning government regulation of the citizenry at large. Second, it assumes that the government's sole interest is the prevention of partiality and the appearance of favoritism, when, as set forth above, the government also has an interest in ensuring that its employees serve only one master and do not shirk their official duties while pursuing profits from other work.[40]

The court below did not even accurately apply this Court's cases on tailoring. "[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation' " and "the means chosen are not substantially broader than necessary." [41] As demonstrated above, the honoraria ban serves substantial government interests; it is more effective than the prior enforcement regime; and it prohibits conduct

[39] *Cf. Broadrick*, 413 U.S. at 616 (rejecting overbreadth challenge against law regulating government employees even though statute "is directed, by its terms, at political expression which if engaged in by private persons plainly would be protected by the First and Fourteenth Amendments").

[40] *See, e.g., To Serve With Honor* at 35 ("The further harm in tolerating honoraria is that such payments encourage outside speeches and travel by federal officials and employees, activities that take time and energy away from the individual's other federal duties"); *Bipartisan Task Force Report* at 40 (pursuit of honoraria "detract[s] from the time and energy [employees] can devote to public service").

[41] *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). The *Ward* standard applies to content-neutral statutes. As the courts below found, the honoraria ban is content-neutral. 788 F. Supp. at 7; *cf. Broadrick*, 413 U.S. at 616 (restricting political speech of government employees is content-neutral regulation).

that is within the government's power to regulate.[42] Therefore, even if overbreadth were the correct test, the honoraria ban would be constitutional.

IV. THE DECISION HOW TO REGULATE HONORARIA IS PROPERLY A POLICY JUDGMENT FOR THE POLITICAL BRANCHES.

The court below failed to give adequate deference to the judgments of the political branches of government about the proper regulation of federal workers.[43] The result of the judgment below is that, unlike legislative and judicial branch employees, executive branch employees can only be forbidden from taking private money for honoraria when there is a nexus between the speech at issue (or the identiy of the payor) and the employee's duties. The Constitution cannot compel a less restrictive ban on executive branch employees than employees of the other branches.[44] Nor can it compel a distinction between different grade levels within the executive branch itself.

A flat ban on honoraria is certainly necessary for senior-level executive branch officials, such as the Secretaries of Commerce and the Treasury and the U.S. Trade

[42] *See Broadrick*, 413 U.S. at 618 (rejecting overbreadth challenge in context of government employee speech, and holding that law may not "be discarded *in toto* because some persons' arguably protected conduct may or may not be caught or chilled by the statute").

[43] *See Waters v. Churchill*, 1994 U.S. LEXIS 4104 at *25-*26 ("we have given substantial weight to government employers' reasonable predictions of disruption, . . . even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential").

[44] The constitutionality of a flat ban on honoraria for legislative and judicial employees is not before this Court. Moreover, the nexus test advocated by the court of appeals could not practicably be applied to members of Congress and judges who are called on to decide matters that cover the full range of issues and affect all sectors of society.

Representative, whose decisions can make or lose millions of dollars for firms in virtually every sector of the economy. It is equally appropriate for numerous lower-level executive branch employees such as Federal Reserve bank examiners, assistant U.S. attorneys, SEC accountants, or OMB economists, any of whom may in a given case (not predictable in advance) exercise substantial discretionary authority over the interests of many entities and individuals. The question of which employees should be subject to a prophylactic ban on honoraria and which should be subject only to a nexus test is a quintessentially legislative decision to which the courts should defer.

The commissions that drafted the proposals ultimately adopted in the Ehics Reform Act unanimously concluded, after careful deliberation, that the government's interest in guarding against the appearance of impropriety as well as actual impropriety warranted a uniform ban. This judgment reflected the shared belief that (1) no artificial distinction between grades or branches provided an adequate cleavage between those who wielded discretionary authority and those who did not; (2) regulations implementing nexus tests (as advocated by the court of appeals) were subject to subjective and inadequate enforcement and to intentional circumvention by federal employees;[45] and (3) the significant public concern with the fair and evenhanded operation of government warranted a prophylactic rule to guard against future conflict.[46]

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[45] *See To Serve With Honor* at 36.

[46] The President's Commission conceded that it was "aware of no special problems associated with the receipt of honoraria within the judiciary," but concluded that the interest "in applying equitable limitations across the government" justified including the courts in the ban. *To Serve With Honor* at 35. The decision below disrupts the goal of uniform and consistent treatment of the three branches which the Ethics Reform Act was specifically designed to achieve.

In light of these findings, the political branches concluded that a subjective case-by-case review of honoraria payments would not protect the public interest as well as a comprehensive prohibition on honoraria. Prior to the honoraria ban, the receipt of honoraria was governed by vague, subjective judgments at the agency level and, to a substantial extent, on self-policing by government employees with a financial stake in non-enforcement. The political branches could have rejected the conclusions of the commissions and instead adopted a more limited statute—but they did not. Their judgment as to the need for strong preventative medicine is entitled to significant deference. *See FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").[47]

This Court has repeatedly upheld far-reaching statutory restrictions designed to promote the integrity and efficiency of the public service. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 101 & n.37 (1947); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers ("CSC")*, 413 U.S. 548, 566 n.12 (1973). Numerous courts have upheld state and local government regulations against "moonlighting" by government employees. *See, e.g., Gosney v. Sonora Indep. Sch. Dist.*, 603 F.2d 522, 527-8 (5th Cir. 1979) (uniform prohibition on outside employment); *Hayes v. Civil Serv. Comm'n*, 108 N.E.2d 505 (Ill. App. Ct. 1952) (ban on all outside employment by government employees). Unless all these decisions are wrong, lesser restrictions such as the prohibition against honoraria cannot rise to the

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[47] As this Court held in the related context of campaign finance regulation: "we cannot require Congress to establish that it has chosen the highest reasonable threshold. The line is necessarily a judgmental decision best left in the context of this complex legislation to congressional discretion." *Buckley v. Valeo*, 424 U.S. 1, 83 (1976).

constitutional level that plaintiffs in this case have claimed.[48]

V. THE REMEDY OF ENJOINING ENFORCEMENT OF THE HONORARIA BAN AGAINST ALL EXECUTIVE BRANCH EMPLOYEES WAS INAPPROPRIATE.

If there is anything that is truly overbroad in this case, it is the remedy chosen by the courts below.[49] The plaintiffs here are all lower-level career employees, grades GS-15 or below. 927 F.2d at 1253. These plaintiffs do not have standing to challenge the honoraria ban as applied to senior-level career employees or political appointees. No one can reasonably dispute that a broad prophylactic ban on honoraria is necessary for the commissioners of the FTC, NLRB, or SEC, for members of the President's Cabinet, or for many (if not all) other senior executive branch employees.[50] The courts below erred when they

[48] On motion for rehearing, two judges discussed the provision in the honoraria ban applying a "nexus" test to a series of speeches. 3 F.3d at 1556-58, 1562-63. As Judge Williams noted, there are valid reasons for a distinction between a single speech and a series of speeches, most particularly because the area of greatest abuse was single speeches. "[I]n addressing complex problems a legislature 'may taken one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Bowen v. Owens*, 476 U.S. 340, 347 (1986) (quoting *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955)). This exception demonstrates that the statute is in fact narrowly tailored to address the areas of greatest abuse, and therefore is not substantially overbroad.

[49] As this Court has held, in fashioning a remedy a court should "refrain from invalidating more of the statute than is necessary." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)).

[50] Indeed, although the court of appeals held that no broad prophylactic ban on honoraria could be imposed on executive branch employees, it then, inexplicably, expressed approval for an Executive Order that applies exactly such a ban to senior executive branch officials. 990 F.2d at 1279. If the statute were really unconstitutional as applied to the entire executive branch, then the Executive Order would be too.

invalidated the statute as to a class of people who were not properly before them, and as to whom the statute is in fact constitutional.[51]

Moreover, a broad prophylactic ban aganist receipt of honoraria is appropriate for at least some lower-level executive branch employees. As discussed above, the court of appeals agreed that "for some of [the honoraria ban's] applications—perhaps many of them—the *Pickering* balance supports its constitutionality." [52] Given this concession, the court should have constructed a remedy distinguishing employees who exercise sufficient discretion to justify a prophylactic ban from those who do not, and should have, at most, held the statute invalid only as against the latter. Even were this Court to determine that the political branches may not ban the receipt of honoraria by all executive branch employees, the appropriate remedy would be to enjoin enforcement of the ban against only those lower-level employees for whom a nexus test will reliably prevent any risk of favoritism or the appearance of impropriety. Of course, the difficulty in drawing this line is what led the political branches to adopt a uniform prohibition in the first place—but this just underscores why the courts should defer to the political branches in matters of line-drawing and policy.

[51] As this Court has observed, standing "is an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992), and is "fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches." *Id.* at 2145. For a court to impose a remedy broader than that the plaintiffs had standing to seek disrupts the constitutional balance as much as for a court to entertain a suit that the plaintiffs did not have standing to bring.

[52] 990 F.2d at 1274. The court later observed that honoraria payments to a Voice of America business analyst would "raise an eyebrow" and stated that it could "understand some anxiety" about such payments to a GS-7 tax examining assistant at the IRS. *Id.* at 1275-76.

CONCLUSION

It may well be that as a policy matter this Court would prefer a less uniform law, one that distinguished among the different branches of government, the different levels of government employees, and the different types of activity for which honoraria are paid. But the political branches had the right to conclude, as they did, that such distinctions would have left room for evasions that would create the reality or appearance of partiality in government service. The Constitution does not forbid a consistent, blanket ban against government workers' obtaining payment from private parties for giving speeches and writing articles.

For the reasons set forth above, the Court should reverse the judgment below.

Respectfully submitted,

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June 13, 1994

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